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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 400

CHARLESTON FEDERAL SAVINGS & LOAN ASSOCIATION, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, WEST VIRGINIA BUILDING & LOAN ASSOCIATION, AND EMPIRE FEDERAL SAVINGS & LOAN ASSOCIATION,

Appellants,

vs.

GEORGE P. ALDERSON, STATE TAX COMMISSIONER OF WEST VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

MOTION TO DISMISS AND STATEMENT AGAINST JURISDICTION.

IRA J. PARTLOW,
Acting Attorney General
of West Virginia,
KENNETH E. HINES,
Assistant Attorney General
of West Virginia,
Counsel for Appellee.

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Motion to Dismiss the Appeal.

The appellee in the above entitled action now files his motion and hereby moves to dismiss the appeal granted on the 21st day of July, 1944, by the Honorable Hershel H. Rose,

President of the Supreme Court of Appeals of West Virginia, upon each and every of the following grounds:

1. Appellants proceed upon the theory that a deliberate and systematic discrimination by the Assessor of Kanawha County is shown by the record in this case. This theory is incorrect, and is entirely unjustified by the facts. It appears from the record in this case, and it was affirmatively decided by the Supreme Court of Appeals of West Virginia, that no deliberate and systematic discrimination was practiced.

2. The alleged federal question is frivolous and insubstantial.

3. The alleged federal question does not concern the validity of a state statute, but directly concerns the administration of a state statute which appellants have never contended is invalid. What they contend is that the assessor, in administering the state statutes, has discriminated against appellants in such a way as to deny to them equal protection of the laws.

4. The appeal was improvidently awarded.

Wherefore, the appellee prays that said action and said appeal heretofore awarded be dismissed and that he have and recover judgment for his costs incurred herein.

IRA J. PARTLOW,
Acting Attorney General
of West Virginia.

KENNETH E. HINES,
Assistant Attorney General
of West Virginia.

STATEMENT OF APPELLEE AGAINST JURISDICTION ASSERTED BY APPELLANTS.

Erroneous Assumption of Facts by Appellants.

Appellants in their statement as to jurisdiction proceed upon the erroneous theory that there has been a deliberate and systematic undervaluation of other species or classes of property and an overvaluation of appellants' property, when as a matter of fact, and as determined by the Supreme Court of Appeals of West Virginia in its written opinion, and as shown by the record herein, there was no deliberate, intentional or systematic discrimination employed.

Appellants likewise assume that the Assessor of Kanawha County, in valuing other species or types of property for the purpose of taxation, deducted 30% of the true and actual value of such properties. The record discloses that the assessor, in valuing notes, open accounts, bonds, household goods, livestock, real estate and other species of property, allowed generally a percentage deduction (approximately 30%) of the face value, book value, purchase value or cost value in order to arrive at true and actual value for assessment purposes. Such official did not allow a 30% deduction of true and actual value. On the contrary, the deduction allowed by him was to arrive at or determine what he believed to be the true and actual value.

As a factual matter, there was no discrimination or inequality in the valuation and assessment, pursuant to statute, of appellants' personal property when compared with the method in which other intangible property in Kanawha County was valued for taxation purposes for the year 1941. The greater part of the assets of building and loan associations consists of mortgage loans or notes, secured by deeds of trust (R. 77, 96, 100). Applying the general method of the assessor of Kanawha County, in ascertaining the value

of notes and accounts, as contended by the appellants, by deducting 30% of the face value thereof, in order to obtain the true and actual value, to the uncontradicted evidence and exhibits of appellants in this case, we find the following:

Exhibit 1 of appellants shows that the personal property assessment of the Charleston Federal Savings and Loan Association, which assessment was made pursuant to statute (Code, 11-3-14a), amounts to $921,800.00 (R. 48, 186). Exhibit No. 2 thereof (R. 49, 187, 188) shows assets generally of said association amounting to $1,363,738.82 consisting, among other things, of first mortgage loans in the sum of $1,282,043.33 and cash of $52,195.90. Applying the method of the assessor, a 30% deduction of the face amount of the mortgage loans would leave an assessed valuation of $897,430.33. Adding thereto the cash item of $52,195.90, we find that, under the general method used by the assessor, the assessed value of the personal property of the Charleston Federal Savings and Loan Association for the year 1941 would have been $949,626.23, an increase over the actual assessment made pursuant to statute of $27,826.23. Wherein has there been systematic or deliberate discrimination in said assessment of the Charleston Federal Savings and Loan Association when compared with the assessment of other owners of notes and accounts in Kanawha County which are assessed under the general method used by the assessor, and which notes and accounts may not have the security of a first mortgage on real estate as do those of said appellant? Instead of being discriminated against such appellant is actually benefited by the statutory method of assessment as made.

The same is likewise true of the appellant, First Federal Savings and Loan Association. Its personal property was assessed pursuant to statute at $249,080 (Ex. 3, R. 51, 196, 215). Its assets, among other things, consist of mort-

gage loans in the amount of $333,029 and real estate notes in the amount of $11,241, which have a real and actual value, as reported in its return to the assessor (30% deducted), of $233,126 and $7,869, respectively (Ex. 4, R. 52, 213). The cash item of $15,369, appearing in said Exhibit, added thereto would constitute an assessed valuation under the general rule of the assessor of $256,364, an increase over the statutory method and actual assessment made of $7,284. Wherein was such appellant discriminated against? Instead of discrimination, it, likewise, is actually benefited by the statutory method of valuation for taxation purposes as made.

The above facts are conclusive that the personal property of appellants, Charleston Federal Savings and Loan Association and First Federal Savings and Loan Association, is not assessed or valued, for taxation purposes, near 100% of book or face value, although counsel for appellants throughout their statement assume and make statements to the effect that appellants' property is assessed at its true and actual value, while other intangibles are assessed at a percentage of true and actual value, or at a value lower than true and actual value. The intangible property of these appellants is actually assessed (pursuant to statute) for the year 1941 at a percentage of book or face value, similar to other intangible property in Kanawha County. Wherein can appellants complain?

For some reason or other the amount of mortgage loans and cash for the assessment year 1941 of the other two appellants, West Virginia Building and Loan Association, and Empire Federal Savings and Loan Association, do not appear in the record. If such information were available in this record, no doubt the results would be similar. The presumption arises, upon failure to disclose such important

facts, that there was likewise no discrimination against these two appellants.

These facts alone seem conclusive without reference to the other facts in the record that there has been no discrimination, systematic, intentional or deliberate, against appellants in applying the method provided by statute for ascertaining the value of appellants' property for taxation purposes, when compared with the methods employed by the assessor of Kanawha County in ascertaining the value of other classes or types of property for the same purpose for the year 1941.

As stated in the opinion of the Supreme Court of Appeals of West Virginia:

> "* * * We do not have a case where the true and actual value was ascertained and a discount allowed from that value; but rather a case where the discount was allowed, particularly as to intangibles, in an effort to reach the true value. The more or less arbitrary allowance of the discount as to notes and accounts may have been an erroneous exercise of the duties of the assessor. We think it was. Some plan which would take into account the difference between the secured notes and the unsecured notes and accounts could, and should be devised; but mere error of judgment as to the plan adopted is not sufficient to establish discrimination, where the plan, though imperfect, is adopted in a good faith effort to secure fair and equitable assessment, and equality and uniformity in taxation."

Appellants may have listed their properties for many years prior to 1941 for assessment at the face value thereof and deducted or discounted 30% pursuant to the general method employed by the assessor of Kanawha County in assessing other intangible personal property such as notes and accounts, as alleged in their statement (pages 9, 22). If such a method were now used in lieu of the statutory

method, appellants' assessment for taxation for the year 1941 would be greater than under the statutory method employed as hereinbefore mentioned. However, prior to 1940, the method of valuing personal property of appellants for taxation was the same statutory method (Code, 11-3-12, 13) applicable to all corporations taxable in the state of West Virginia. *Charleston Federal Savings & Loan Association* v. *James, Tax Commissioner*, 120 W. Va. 781, 200 S. E. 845. It was not until 1940 that the present statutory method for ascertaining the valuation of property of building and loan associations for taxation purposes was applicable. The presumption is that this statutory method is applied uniformly throughout the state in accordance with the instructions of the tax department to the assessors of the several counties of the state. (See Record, 159, 276-278.) This method was applied in Hancock County, West Virginia, for the year 1941, by the assessor of that county. See *In re Assessment Hancock County Federal Savings and Loan Association* (W. Va.), 25 S. E. (2d) 543.

The validity of the statute (Code, 11-3-14a) is not now and never has been questioned by appellants and they do not contend that the assessments of appellants' property for the year 1941 exceeded the true and actual value. They simply contend that because a method is applied in ascertaining the true and actual value of other kinds and classes of property which differs from the statutory method as applied to appellants' property and other like associations or corporations throughout the state, that a deliberate and systematic discrimination of undervaluing certain properties and overvaluing appellants' property for tax purposes has occurred. Such facts, we submit, are not supported by the record, nor by the finding of the State Court. In fact, the State Court found to the contrary.

We deem it unnecessary to cite numerous authorities of this Court to the effect that it is not the province of this Court to weigh the testimony; that a decision of the State Court on questions of fact ordinarily is not subject to inquiry in this Court; and that such findings of fact by the State Court will be disturbed only where there is no evidence to support the findings.

The Alleged Federal Question Is Frivolous and Insubstantial.

We believe that it is settled by numerous decisions of this Court that it will decline jurisdiction although the constitutionality of a state law or other Federal question is involved, where it appears that such question is not substantial (*Zucht* v. *King*, 260 U. S. 174), or "is of such an unsubstantial nature as to cause it to be devoid of all merit, and therefore frivolous" (*Deming* v. *Carlisle Packing Co.*, 226 U. S. 102), and that the assertion of a Federal right must not be wholly without foundation, but "must at least have fair color of support" (*Parker* v. *McLane*, 237 U. S. 469). Other decisions in which jurisdiction has been denied or appeals dismissed on similar grounds include: *Wabash Railroad Co.* v. *Flannigan*, 192 U. S. 29; *United States Fidelity & Guaranty Co.* v. *Oklahoma*, 250 U. S. 111; *Ennis Water Works* v. *City of Ennis*, 233 U. S. 652.

If appellants are now attempting to urge in their statement as to jurisdiction that the statute (Code W. Va., 11-3-14a) is invalid, such question is raised too late when asserted for the first time in this court. *Wabash Railroad Co.* v. *Flannigan, supra.* The petition or application of appellants to the State Supreme Court of Appeals makes no such contention (See Record, pages 1-16).

The Supreme Court of Appeals of West Virginia has determined as a fact that there was no deliberate, inten-

tional or systematic discrimination against appellants, which fact is fully supported by the record, by reason whereof the contention of appellants that the decision of the State court does violence to any provision of the Federal Constitution is utterly insubstantial and frivolous.

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. * * * But a discriminatory purpose is not presumed, Tarrance v. Florida, 188 U. S. 519, 520, 47 L. Ed. 572, 573, 23, S. Ct. 402, there must be a showing of 'clear and intentional discrimination,' Gundling v. Chicago, 177 U. S. 183, 186, 44 L. Ed. 725, 728, 20 S. Ct. 633; see Ah Sin v. Wittman, 198 U. S. 500, 507, 508, 49 L. Ed. 1142, 1145, 1146, 25 S. Ct. 756; Bailey v. Alabama, 219 U. S. 219, 231, 55 L. Ed. 191, 197, 31 S. Ct. 145. * * *"
>
> *Snowden* v. *Hughes*, 88 L. Ed. (Adv. Op.) 347.

No claim is made that appellants' property is singled out from the property of like associations or corporations of the same class. On the contrary, the presumption arises that the assessors throughout the State followed the instructions of the tax commissioner as given to them, which instructions are in accord with the statute as construed by the State Supreme Court in the *Hancock Federal Savings & Loan case, supra.*

> "* * * It must be emphasized that the Company makes no claim that its property is singled out from among other public service corporations for discrimination. Its asserted grievance is common to the whole class. We must put to one side therefore all those cases relied on by the petitioner which invoked the Fourteenth Amendment against discriminations invidious to a particular taxpayer. * * * All these

cases are inapposite. None denied power to a State to apply different yardsticks to different classes of property. * * *

"That the States may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate—these are among the common-places of taxation and of constitutional law. * * *"

Nashville, C. & St. L. Railway v. *Browning*, 310 U. S. 362, 84 L. Ed. 1254.

A Question of Discrimination in Administering a Valid Statute Cannot Be Reviewed by This Court upon Appeal.

In this case appellants do not contend that the statute is invalid, but do contend that in administering the statute the assessing officials have discriminated against appellants. See appellants' statement, pages 15-16. Assuming (but not admitting) such discrimination appellants are not entitled to a review by appeal as provided by Title 28, Section 344, U. S. C. A., as amended.

"The bill contains also averments to the effect that, in administering the ordinance, the officials have discriminated against the plaintiff in such a way as to deny to her equal protection of the laws. These averments do present a substantial constitutional question. * * * *But the question is not of that character which entitles a litigant to a review by this court on writ of error (appeal).* The question does not go to the validity of the ordinance; nor does it go to the validity of the authority of the officials. * * * This charge is of an unconstitutional exercise of authority under an ordinance which is valid. * * * Unless a case is otherwise properly here on writ of error, questions of that character can be reviewed

by this court only on petition for a writ of certiorari."
Zucht v. *King*, 260 U. S. 174, 67 L. Ed. 194.

Wherefore, it is respectfully submitted that no substantial Federal question is submitted by appellants and it is urged that the appeal hereinbefore mentioned should be promptly dismissed.

Respectfully submitted,

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State Tax Commissioner,
By Counsel.

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